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Mercy Catholic Medical Center, Mercy Philadelphia Hospital Division and District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO, Petitioner. Case 04-RC-191143

December 16, 2017

ORDER

**BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND KAPLAN**

The National Labor Relations Board¹ has carefully considered the Employer's Request for Review of the Regional Director's Decision on Exceptions to the Hearing Officer's Report on Challenged Ballots, as well as the Petitioner's Opposition to the Employer's Request for Review. The request for review is denied as it raises no substantial issues warranting review.²

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² Contrary to our colleague, who would grant review of the Regional Director's finding that the Employer's Operating Room Technicians ("OR Technicians") are technical employees who should be excluded from the petitioned-for nonprofessional bargaining unit, we note that the Board has categorized OR Technicians as technical employees when their work is of a technical nature involving the use of independent judgment, and they possess specialized training acquired through special courses or schooling. See *Rhode Island Hospital*, 313 NLRB 343, 353-354 (1993); *William W. Backus Hospital*, 220 NLRB 414, 418 (1975); *Medical Arts Hospital of Houston, Inc.*, 221 NLRB 1017, 1019 (1975). In that regard, the Board has found that OR Technicians are technical employees even where, as here, some training—but not certification—is required. E.g., *Rhode Island Hospital*, above (3-month to 1-year training); *William Backus Hospital*, above (6-month training). Further, the Board in *Rhode Island Hospital* noted that even though the OR Technicians there engaged in routine duties, like cleaning, and followed a standardized procedure for organizing the tool tray, they were nonetheless technical employees. The Board found sufficient evidence of acquired skills and independent judgment where OR Technicians use their specialized training and experience to select from among thousands of instruments for each surgery, even when guided by surgeon preference cards, and anticipate the surgeon's needs by supplying the appropriate instruments at the appropriate times. See e.g. *Meriter Hospital*, 306 NLRB 598, 600 (1992). The cases cited by our colleague are distinguishable. In those cases, the OR Technicians had no training or certification requirements; nor did they perform the skilled duties, using independent judgment, described above. Contrary to our colleagues' assertion, we recognize the interplay between the OR Technicians' specialized training and experience and their use of independent judgment to select and anticipate the appropriate instruments during surgery. Here, the evidence is before us that while the OR Technicians may rely on surgeon preference cards to prepare tools in the pre-surgery stage, during the surgery the OR Technicians rely on their independent judgment to select and supply the correct tool as needed by the surgeon. Accordingly, we find that the Regional Direc-

Dated, Washington, D.C. December 16, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Marvin E. Kaplan, Member

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tor properly excluded the OR Technicians from the nonprofessional bargaining unit as technical employees.

Member Kaplan joins his colleagues in denying review, except as to the Regional Director's finding that the OR Technicians are technical employees who should be excluded from the nonprofessional bargaining unit. Initially, Member Kaplan observes that the Board has not categorized OR Technicians as technical employees where, among other things, they fail to exercise a sufficient degree of independent judgment in assisting physicians. See, e.g., *Heights Hospital*, 221 NLRB 563, 564 (1975); *St. Elizabeth Hospital of Boston*, 220 NLRB 325, 329 (1975). For example, in *Barnert Memorial Hospital Center*, 217 NLRB 775, 780 (1975), the Board found that noncertified OR Technicians who performed nontechnical functions including handing the surgeon instruments were not technical employees. By contrast, the Board found that a certified OR Technician who received additional training and undertook extra functions, including performing duties related to "very major surgery" and working alone in the minor surgery room, was a technical employee. Here, Member Kaplan would grant review for the limited purpose of reviewing the record (the Board reviewed the record in cases like *Rhode Island Hospital*, cited by his colleagues) to determine whether it supports finding that the OR Technicians exercise independent judgment in the performance of their job functions. Without prejudging the issue, he finds it at best unclear at this point whether the record establishes that factor. Compare *Heights Hospital*, id. (finding that OR Technicians were not technical employees, in part because their principal job functions—handing surgical instruments to physicians in surgery and scrubbing the operating rooms—"are for the most part routine and do not require the use of any substantial degree of independent judgment"), with *Meriter Hospital*, above at 600 (finding that OR Technicians were technical employees, in part because they performed technical duties like minor suturing). Member Kaplan believes that his colleagues give undue weight to the other factors the Board assesses to determine whether an individual is a technical employee—such as training—while discounting the apparent lack of technical duties exercised by the OR Technicians. In fact, it appears that his colleagues conflate training with the exercise of independent judgment. In Member Kaplan's view, simply because the OR Technicians were trained to recognize the instruments they hand to the surgeon does not mean they exercise independent judgment in doing so.